Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-407

JULIO DIAZ,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Julio Diaz, petitioner herein, respectfully prays that a writ of certiorari be issued to review an order of the New York Court of Appeals which upheld the legality of police action in stopping a motor vehicle and the resulting search and seizure of a controlled substance, to wit heroin, which was then found in the detained automobile.

The petitioner was arrested on March 9, 1973 and charged under the New York State Penal Law with Criminal Possession of a Controlled Substance in the Fourth Degree. A hearing to suppress the narcotic drugs found on the basis of an illegal search and seizure was held on May 25, 1973 before the Honorable Jack Rosenberg, a Judge of the Supreme Court of the State of New York, New York County. Judge Rosenberg denied the petitioner's motion to suppress and a trial on the merits was thereafter held. On June 7, 1974 the petitoner was convicted upon a jury verdict of the crime charged and was thereafter sentenced to an indeterminate term of up to three years.

An appeal was thereafter taken to the Appellate Division, First Department, and on November 6, 1975 that Court unanimously reversed Judge Rosenberg's Order and held that the motion to suppress should have been granted. The People thereafter appealed to the New York Court of Appeals and on February 17, 1977 that Court in a brief memorandum decision reversed the Appellate Division and remanded the case to that Court for further factual findings. On June 16, 1977 the Appellate Division affirmed the petitioner's conviction. The petitioner

has now exhausted all state remedies, and on August 31, 1977 was in fact forced to begin the commencement of his sentence previously imposed of up to three years in prison.

OPINIONS BELOW

The opinion of Judge Rosenberg is officially unreported but is set forth in Appendix A. The Appellate Division Order and Decision of November 6, 1975 is officially reported at 50 A.D.2d 526 and a copy is set forth in Appendix B. The New York Court of Appeals Order and Decision is officially reported at 41 N.Y.2d 876 and a copy is set forth at Appendix C. The final decision of the Appellate Division is as yet not officially reported but a copy is set forth at Appendix D.

JURISDICTION

The Order and Decision of the New York Court of Appeals was dated February 17, 1977. The final decision of the Appellate Division, First Department, affirming petitioner's conviction on the facts was dated June 16, 1977. The petitioner is therefore timely filing this

application for a writ of certiorari and jurisdiction of this Court is invoked pursuant to Title 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether the police acted properly in initially stopping and detaining the petitioner's vehicle.

2. Whether the ensuing search and seizure of a controlled substance violated the petitioner's constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provisions involved in this case are the Fourth and Fourteenth Amendments to the United States Constitution.

STATEMENT

The testimony at the initial suppression hearing before Judge Rosenberg was to the effect that on March 9, 1973 while driving in an unmarked vehicle and in the company of three other officers, Police Officer Bryne of the New York City Police Department observed a 1969 Cadillac parked at the corner of Broome and Allen Streets in downtown Manhattan, an area known to him for its high incidence of narcotics traffic. Officer Bryne stated that he observed (from a distance of some thirty to fifty feet) the driver of the vehicle (Diaz) and an unknown male who was standing alongside the vehicle in conversation. The unknown male then removed some money from his pockets, counted it and handed it to the driver. The driver then handed something to the unknown male in a closed hand. Bryne then stated that a female who was accompanying the unknown male, observed their vehicle and after motioning to her partner they walked hurriedly east on Broome Street. The Cadillac then pulled away gradually and proceeded north on Allen Street in an uptown direction. The police officers followed the Cadillac and on the next street Officer Backes went over to the vehicle

identified himself as a policeman and told the operator (Diaz) to shut off the motor and get out of the car. According to Bryne, as Diaz opened the door of the vehicle he handed a clear plastic bag, approximately three inches by five inches in size, to the passenger sitting in the front seat. The officer opened the car door and seized the bag. An examination of its contents revealed a controlled substance containing heroin. During cross-examination Officer Bryne acknowledged that he at no time overheard any conversation between the unknown male and the driver of the Cadillac and reiterated that the only thing he observed was currency in bill form pass from the unknown male to Diaz. The officer positively stated that no traffic infraction had been committed by the Cadillac.

The hearing was then adjourned in order for the People to produce the other police officer and some nine weeks later Officer Backes testified to some additional information not mentioned by the first officer, to wit: that one of the other officers in the vehicle had mentioned at the time of the initial observation of the Cadillac that the unknown female was a prostitute and the guy standing in the street was one of the local junkies.

Backes further stated that the Cadillac in question had Massachusetts license plates.*

Petitioner seeks review by this Court in a Writ of Certiorari because it presents a timely opportunity for the Court to clarify changing concepts and applications of the search and seizure principles under the Fourth Amendment. The New York Court of Appeals in several recent decisions appears to be walking a tightrope in determining issues similar to the case at bar. The Court has drawn narrow boundaries attempting to distinguish between those cases where probable cause is needed, when "reasonable suspicion suffices", and under the case at bar where intrusions are authorized merely

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* These new additional factors injected into the suppression hearing appear highly suspect, especially coming nine weeks after Bryne's lengthy initial testimony where he failed to ever mention them, and after Judge Rosenberg indicated he might grant defendant's motion to suppress. Further the officer to whom these statements were attributed when he testified at the trial made no mention of them.

for investigatory stops. The Court of Appeals in the case at bar and in People v. DeBour, 40 N.Y.2d 210, relied upon in deciding the instant matter has concluded that since not every police-citizen encounter constitutes a seizure an investigatory stop may be sustained in the absence of probable cause or reasonable suspicion. See also, People v. Cantor, 36 N.Y.2d 106. In the case at bar, however, the Court of Appeals decision flies in the face of this Court's express dictates in Terry v. Ohio, 392 U.S. 1; Sibron v. New York, 392 U.S. 40 (1968) and Adams v. Williams, 407 U.S. 143. What occurred here was the stopping and the actual seizure of a vehicle and its passengers. The police officers specifically stated that they identified themselves as policemen to the petitioner and ordered him to shut off the ignition and get out of the vehicle. This certainly is a restriction of freedom of movement and a seizure of the person. In Terry v. Ohio, 392 U.S. 1, 16, this very Court clearly held that when a police officer detains an individual and restrains his freedom of movement he has in effect seized that person. Further, this Court recognized that a detention of a citizen is not a "petty indignity" but is instead a serious intrusion upon the sanctity of the person. 392 U.S. 17. The New York Court of

Appeals ruling in the case at bar appears to alter this Court's pronouncement in this area and to set up a new category of "investigatory situations where probable cause and reasonable suspicion are dispensed with even when a strong element of intrusion on persons remains. (See also People v. DeBour, 40 N.Y.2d 210.) In the case at bar the Court of Appeals justified and held as constitutionally permissible a "seizure" in which the vehicle was stopped and its passenger was ordered out based upon only haphazard observations which gave no inference of any criminal activity. No criminal activity was observed whatever by the police prior to the stopping of the vehicle, and the petitioner had no prior criminal history. No conversation was overheard by the officers and in fact absolutely nothing took place which could support a reliable inference of illegal activity. The fact that a known narcotic addict and prostitute * was seen speaking to

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* This Court is again reminded that this hearsay testimony came in only through the second police officer who testified nine weeks after the initial hearing and only after consulting with the first officer and being aware that the Court below was considering granting defendant's motion to suppress.

the driver of the vehicle and money exchanged as clearly established in Sibron v. New York , 392 U.S. 40 is not sufficient grounds for stopping and searching an individual. The fact that a vehicle had an out-of-state license plate also is no indication whatever of wrong doing but is susceptible of any innumerable variations of innocent conduct.

In Rios v. United States, 364 U.S. 253 (1960) this Court also indicated its doubts as to the right of police officers to stop a taxi cab under circumstances similar to the case at bar.

Any argument that the stop and subsequent search in the case at bar can be justified because of the necessity to "insure the police officers safety" is also fallicious. In Terry v. Ohio, supra, this Court held that a search could be justified for the protection of the officers but only if:

> "he has reason to believe that he is dealing with an armed and dangerous individual regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely

> certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." (392 U.S. 27)

In the case at bar the two persons talking to the petitioner and allegedly being a known narcotics addict and a prostitute, had long departed from the scene and no evidence was presented at the hearing in any way to indicate that the petitioner or the other occupant of the vehicle were armed or dangerous. The police officers in fact gave no testimony that they believed their safety was in danger. The fact also that the incident occurred in a high crime area also gives no justification for the stop and seizure which occurred here. On the contrary, to justify the search which took place in the case at bar leads to a situation where any police-citizen encounter in a big city can be justified on the basis of an allegation of police safety and the incidence of high crime.

The case at bar and related New York Court of Appeals cases * addressing themselves to the issue of police investigatory stops, and the common law right of inquiry present issues which should be reviewed and determined by this Court, in order to give direction and some semblance of stability to the changing concepts in the law of search and seizure. It is respectfully urged that the Court seize the opportunity offered to it to decide the fundamental issues presented by the case at bar.

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* For a taste of the varying Court of Appeals pronouncements in the area see People v. Cantor, 36 N.Y.2d 106; People v. Ingle, 36 N.Y.2d 413; People v. Allende, 39 N.Y.2d 474; People v. Lypka, 36 N.Y.2d 210; People v. Rosemond, 26 N.Y.2d 101.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A -

DECISION AND ORDER OF JUSTICE ROSENBERG IN THE SUPREME COURT, NEW YORK COUNTY, SEPTEMBER 21, 1973.

THE COURT: I am ready to render a decision in this case, as far as I'm concerned, gentlemen, I'm assuming --

MR. O'ROURKE: Your Honor has --

THE COURT: Pardon me. Mr. O'Rourke early in the day indicated that he sought -- he had other evidence. As far as I'm concerned, the Record speak for itself. He can say anything he wants. Go ahead. Actually, I was supposed to get briefs and memos and never got them.

MR. O'ROURKE: The Record does show I didn't receive any from the D.A.. The Record does speak for itself, your Honor, and you've read the Record. I have nothing to add.

THE COURT: All right. I think first some basic factors should be stated which is, of course, that Defendants had the burden of proof, rather has the burden of satisfying the Court by quantum of proof provided by law. Secondly, as

to the question of credibility, the only persons that testified here, the only witnesses were the two police officers. The Defendants nor any other witnesses testified on their behalf, so therefore, I must judge it on that testimony. While there is one area of what might be considered some contradiction, obviously, making judgment one has to always keep in mind that totality of testimony, keep in mind the fact that, unfortunately, the Police Department in my opinion inefficiently trains officers to keep records so that their recollection would be correct. Both of these officers, to my best recollection, testified purely from recollection, so that the area of, one might call conflict to my mind could be resolved really by consideration that the officers were testifying as to the best recollection. The facts that I find credible are that on the day of the issue here, on the event, March 9th at about -- 1973 -- at about eight p.m., Officer Byrne (phonetic) and his fellow officer, Backus and others were on patrol in what has been described as, which I accept to be, a heavy -- really they called it a heavy narcotic area.

MR. O'ROURKE: I don't believe they used that expression. I think they used high incident crime area.

THE COURT: High in narcotics area and I have accepted it to mean, I think I can almost take judicial notice of the fact that it's a high incident crime area, as you just put it, which was Delancey Street, Broome Street, Allen Street area, when they observed, and I take that, I accept that as fact, as credible, observed what appeared to be to them from their experience, mere experience, actions that would indicate to them probably some narcotic involvement, but legally speaking, I am accepting it solely to be suspicion. If I were to decide this case on the fact that they observed which was passing, apparently of money, and the exchange of something else, I use those words in quoting something else because the exchange was not seen, that which was exchanged was not seen, specifically at this point in my opinion, I don't know that the Appellate Court or other courts might even see it differently. My opinion, though, is there was no probable cause at that point, but based upon that observation, these officers who had been in a car, in a vehicle, having observed these Defendants in another vehicle, that being a Cadillac with a Massachusetts license plate in this particular area, this high incident crime area late at night or at least eight p.m. at night, having seen what they saw, did

follow in their vehicle, this Cadillac, which was occupied by these two co-defendants, and when they then stopped the vehicle, the Record will show at, I believe at Delancey and Allen Street, am I correct, Mr. O'Rourke?

MR. O'ROURKE: I don't believe so, I think it was -- Allen and Delancey is correct.

THE COURT: Yes, and they then approached, they being the officers, Officer Backus particularly, and Officer Byrne. I might say that their attention had--well, it's unimportant who brought to the attention originally. Strike that out. Just go back to the fact that they proceeded and stopped the cars, the car of the Cadillac at Delancey and Allen Street. They then approached the vehicle and I find it credible that at that point when they approached the vehicle as testified to, that the officer, Officer Backus did observe the Defendant Diaz pass a package, plastic, or am I in error --

MR. O'ROURKE: He said it was a plastic --

THE COURT: Plastic package which he really saw through which, allegedly,

contained what appeared to him to be glassine envelope, which he as an expert felt contained narcotic contraband. Now, the issue certainly is that he, as I understand it from the Defendant's position, is that he had no right in which he did do. I will accept that he did that. There's a conflict even as to that. As to the point I'm about to make, the evidence indicates, I think one officer said that he directed -- did tell the Defendant to get out of the car. I think Backus' testimony is basically in the Record here, is to the effect that he, that Backus was getting out of the car when he saw what he saw happen.

MR. O'ROURKE: Backus was getting out of the car?

THE COURT: Rather, Diaz. In other words, I think Backus' testimony is not that he ordered him out of the car. I think it's Byrne's testimony that he, Backus, directed Diaz to get out of the car. I think it was the Defendant's position or is the Defendant's position that since there was no probable cause prior to the approach of the car, I don't think that the People have no right, that is, the officer had no right to direct the Defendant to leave the car. This is the area of conflict that I talk

about between the two officers in my opinion, though, as a matter of law, the officers had a right in totality of the circumstances having seen what appeared to be a suspicious act, that they believed involved narcotics in a high incident crime area based upon their experience, they certainly had the right to further investigate. They certainly had both under the Motor Vehicle Law or, although they did that, in all fairness, the Record should indicate that neither officer claimed that there was any inquiry about licenses at the scene, operator's or otherwise.

MR. O'ROURKE: Or any allegation of a traffic violation.

THE COURT: Or any allegation of a traffic violation. In my opinion, they had the common law right to stop the car and investigate. Now, they had no right at that point, in my opinion, as a matter of law, to search. I do not believe this legal search -- the officer's testimony which I accept as credible was that he observed what he knew to be, from his experience, and believed to be from his experience an article, that is a plastic article, containing when he saw, as he stated, apparently glassine envelopes to be narcotics, and that having seen

that in open view, that gave him the probable cause, and while I feel that it's no help to me by either side, as far as the law is concerned, and while I honestly feel there is a close question here, I do believe that People against Rosemond, 26 New York Second, that the officers had the right to do what they did up until that point where Officer Backus said he saw what he did in open view, and I find him to be credible in his observation, and I do feel that that was sufficient to give him probable cause to arrest, and I further feel that even if accepting now, if one does, it's the testimony of Officer Byrne to the effect that he, Officer Backus, told the Defendant Diaz to step out of the automobile. Even if you accept that as factual, and Officer Backus disagrees with that, as I say, that type of conflict can occur in recollections. The hearing took place two dates, and some length of time after the original event, so that there could be a question of recollection and fair question and not relating to any credibility issue, but just a different recollection or belief as to what happened, but even in taking the best set of facts to the viewpoint of the Defendant, almost favorable, the fact is that whether he had a perfect right in my opinion under the area that we are talking about, under the circumstances, knowing an officer being

experienced in the climate of day to ask these Defendants to step out of the vehicle so that they could protect themselves, and, incidentally, that -- the testimony is that it was done as safety measure by one of the officers, but they certainly had that right and I don't think that in any way taints the, what I consider to be an open view observation, and once having made that observation, they had a right to arrest and everything that followed, that is the search incident to the arrest that followed thereafter and was proper and, therefore, the motion to suppress all of the contraband and the slips, the policy slips, if I may call it that, whether they are or not, is also -- that motion is also denied. I'm not denying it as to the so-called policy slips on the theory it's contraband, there is no such charge here. I'm denying it simply on the theory it has to be presented here on the theory that it was a seizure and I think it's for the trial judge, not for me, really, in the final analysis whether it's relevant as to the trial that takes place, but since it's an issue, I'm certainly making clear that I have not suppressed those slips and since it was seized after what I consider to be a legal arrest, actually, I am not saying at this time it's not for me, it's for the trial

judge in his ruling to state whether that's admissible on different grounds. Now, there's also a motion here, as I didn't mention and should add, to suppress statements. I am satisfied beyond a reasonable doubt that the Defendants were given the Miranda warnings and that they understood the Miranda warnings and, therefore, I denied that application, too, on the basis that -- or, the statements that are made and appeared in the Record are not suppressed. Motion is denied. I think that concludes --

MR. O'ROURKE: Your Honor, with respect to the Huntley hearing, and your Honor take into consideration, I think it was Officer Byrne's admission in response to my question that the Defendants did ask to speak to an attorney and they specifically named one.

THE COURT: You can look at the Record. I don't see they asked him. Here's the Record. You got the Record with you?

MR. O'ROURKE: Yes, I have.

THE COURT: You show me in the Record that's a fact that they wanted to. There's no indication. If there is, and I don't see it, maybe you're right. I don't

recall it. You talk about Officer Byrne?

MR. O'ROURKE: Yes.

THE COURT: His answer to your question, and I'm readin from page 44 first, on cross examination, on page 45, top of 45, you asked this question when you stated, quotes, you have a right to have an attorney present, unquote, did not Mr. Diaz and Mr. Battista call my office? Answer, I don't recall if they called then or later. Now, if what you're saying is that they eventually made a call or they did make a call, that doesn't indicate that they did not understand the right. That does not indicate the statements were not made voluntarily and intentionally. The Record is clear.

MR. O'ROURKE: My suggestion was that they did, in fact, insist and inquire of --

THE COURT: You may make such a suggestion, except your suggestion is not a part of this Record. You understood that you had a perfect right to produce any witnesses. They do not agree with you. I go by this Record. You are inferring because they eventually made a call or that they may have made a call

that their statements were not proper statements. There's no indication in this Record that they made a call and they told the officers that they wanted to make a call, they do not want to make any statements until they want to speak to a lawyer. The Record indicates here that they knew, they were given the Miranda warnings properly and they did make certain statements and the Record only indicates on the subject matter that you're talking about, that the officer says that he doesn't know when they made a call, now, they may have made a call before or after and he may have said, in essence, theoretically to them, say anything you want to say. I don't know, nobody knows. The Record is devoid of when it was made, under what condition it was made, and whether they made any objection to making any statement and wanted to make the call first, etc. All of that is devoid, all you brought out was they may have made a call before or after. That's all you brought out and that doesn't indicate that their statements were made under any coercive or involuntary or lacking intelligence or didn't understand the warning, so that I have nothing to base it on except the Record that I'm talking about, and, accordingly, the both motions are denied, gentlemen. If you want to, I'll be glad

to set a date down and refer it back to Part A.

(At this point, there was a discussion at the Bench.)

THE COURT: All right, after conference at the Bench, I might say, gentlemen, for the Record, that as far as I'm concerned, this, as the facts that appear in this Record give, it's a close question, in my opinion and as a matter of law, but I think -- I have found the officers credible and it's really a question of law on the basis of what I found, and I feel that there was open view here and I think that they had a perfect right, as I have indicated, on that open view, that that open view was not tained by any of their actions, in my opinion, as a matter of law, but you, of course, Mr. O'Rourke, have a right to test my thinking in the facts of law as a -- rather, of the laws that apply to the facts here. Referred back to Part A for trial, for what date, gentlemen?

APPENDIX B -

ORDER AND DECISION OF APPELLATE DIVISION, FIRST DEPARTMENT, NOV. 6, 1975.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 6, 1975

Present-Hon. Arthur Markewich, Justice Presiding,
Theodore R. Kupferman,
Francis T. Murphy, Jr.,
George Tilzer,
Louis J. Capozzoli,
Justices.

The People, etc.,
Respondent,

-against-

Julio Diaz,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Flynn, J.), rendered on June 7, 1974, convicting defendant, upon

a jury verdict, of criminal possession of a dangerous drug in the fourth degree,

and said appeal having been argued by Mr. Robert Blossner of counsel for the appellant, and by Mr. Peter L. Zimroth of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, the motion to suppress evidence granted, and the indictment dismissed.

ENTER:

HYMAN W. GAMSO

Clerk.

Markewich,J.P., Kupferman,Murphy, Tilzer, Capozzoli, JJ.

1298
The People of the State of New York,
Respondent, P.L.Zimroth

-against-

Julio Diaz,
Defendant-Appellant.
R. Blossner

Judgment, Supreme Court, New York County (Flynn,J.) entered June 7, 1974, of conviction, upon a jury verdict, of Criminal Possession of a Dangerous Drug (4th Degree), unanimously reversed on the law, the motion to suppress evidence granted, and the indictment dismissed.

Police officers in an unmarked police automobile stopped for a red light on the lower east side of Manhattan, when they saw the defendant's car parked at a corner with the defendant in the driver's seat and his co-defendant alongside, and with an unknown male and female standing by the vehicle. They observed the unknown male counting out some currency and handing it to the defendant driver, and he handed something back to the man, but the policemen could not see what it was. The unknown

couple then walked away, and the defendant drove his car off followed by the police. At the next light, several of the policemen exited their car, identified themselves to the defendant as police officers and ordered the defendant out of his car. He was seen surreptitiously to hand a clear plastic bag to the co-defendant. The co-defendant was then arrested, and the plastic bag which contained glassine envelopes filled with heroin was seized.

While there was some testimony that one of the policemen knew the unknown male as a local junkie, and the unknown female as a prostitute, the policeman to whom this knowledge was attributed did not testify at the suppression hearing, and when he testified at the trial, this aspect was not mentioned.

Under all of the circumstances, there was insufficient basis to justify the stopping of the automobile, and the motion to suppress the evidence should have been granted. As the remaining evidence was insufficient to sustain any charge against the defendant, the indictment should be dismissed. People v. Cantor, 36 N.Y.2d 106 (1975); People v. Lebron, 48 A.D.2d 800 (1st Dept. 1975).

Order filed.

APPENDIX C -

OPINION OF NEW YORK COURT OF APPEALS, FEB. 17, 1977.

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 65
The People &c.,
Appellant,
vs.
Julio Diaz,
Respondent.

(65)Robert M. Morgenthau,DA,NY Cty (Brian Rosner & Peter L. Zimroth' of counsel) for appellant.
Arnold Wallach & Robert Blossner, NY City, for respondent.

MEMORANDUM:

At the suppression hearing, defendant's counsel did not express disagreement with the hearing court's comment that there was no disputed issue with respect to the police officers' right "to go over to" the car to

investigate the suspicious activity they had previously observed * (cf. People v DeBour, 40 NY2d 210). The only question was whether the police could also direct the defendant to shut off the ignition and get out of the car which was then stopped at a traffic light. The hearing court accepted the officers' testimony that this was done in order to insure their safety during the inquiry and this factual determination was not disturbed by the Appellate Division. In view of this we have concluded that the officers acted reasonably under the circumstances. Thus the evidence which was observed in plain view, as the defendant prepared to leave the car, should not be suppressed.

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* It is respectfully suggested that the Court's statement in this regard is factually incorrect. The circumstances surrounding the initial stopping of the vehicle were gone into and were discussed at length at the suppression hearing. In addition, the point was argued extensively in the Appellate Division and Court of Appeals briefs. The Appellate Division in fact held as a matter of law that there was an insufficient basis to justify the stopping of the vehicle. (See Appendix B). The Court of Appeals' reliance on defense counsel's silence at some point in the suppression hearing and its interpretation that silence amounts to acquiescence is a tortured view of the facts.

Accordingly the order of the Appellate Division should be reversed, the conviction reinstated and the case remitted to the Appellate Division for review of the facts.

* * * * * * * * * * * *

Order reversed and the case remitted to the Appellate Division, First Department, for further proceedings in accordance with the memorandum herein. All concur.

Decided February 17, 1977

APPENDIX D -

ORDER AND OPINION OF APPELLATE DIVISION, FIRST DEPARTMENT, JUNE 16, 1977.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 16, 1977.

Present-Hon. Francis T. Murphy, Jr.,
Presiding Justice,
Theodore R. Kupferman,
Louis J. Capozzoli,
Arthur Markewich,
Justices.

The People of the State of New York,
Respondent,

-against-

Julio Diaz,
Defendant-
Appellant.

1298 (1975)

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York

County (Flynn, J.), rendered on June 7, 1974, convicting defendant, upon a jury verdict, of criminal possession of a dangerous drug in the fourth degree,

And this Court by order entered on November 6, 1975, having unanimously reversed the aforesaid judgment, granted the motion to suppress evidence, and dismissed the indictment,

And the respondent having appealed to the Court of Appeals of the State of New York,

And the Court of Appeals, by order entered on February 17, 1977, having ordered and adjudged that the order of this Court entered on November 6, 1975, be reversed and the case remitted to this Court for further proceedings in accordance with the memorandum of the Court of Appeals,

And said appeal having been argued by Mr. Robert Blossner, of counsel for the appellant, and by Mr. Peter L. Zimroth, of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same hereby is affirmed, and the case is remitted to the Criminal Term, Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

ENTER:

JOSEPH J. LUCCHI

Clerk.

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Murphy,P.J., Kupferman, Capozzoli, Markewich, JJ.

1298(1975) The People of the State of New York,
Respondent,
P.L.Zimroth

-against-

Julio Diaz,
Defendant-Appellant.
R.Blossner

Upon remittitur from the Court of Appeals, judgment, Supreme Court, New York County (Flynn, J.), rendered June 7, 1974, of conviction, upon a jury verdict, of criminal possession of a dangerous drug (4th degree), unanimously affirmed, and the case is remitted to the Criminal Term, Supreme Court, New York County, for further proceedings pursuant to CPL §460.50(5).

This Court reversed the conviction and granted a motion to suppress evidence and dismiss the indictment, 50 AD 2d 526. The Court of Appeals reversed and remitted for our consideration of the facts and further proceedings in accordance with its memorandum, N Y 2d . Under the circumstances, we see no reason to interfere with the determination and sentence previously imposed.

Order filed.

Supreme Court, U. S.
FILED
OCT 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-407

JULIO DIAZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

On March 20, 1974, Julio Diaz was convicted in the Supreme Court, New York County (FLYNN, J.), after a jury trial, of CRIMINAL POSSESSION OF A DANGEROUS DRUG IN THE FOURTH DEGREE (former Penal Law Section 220.15, repealed L. 1973, c. 276, Section 18). On June 7, 1974, petitioner was sentenced to an indeterminate term of imprisonment not to

exceed three years. In a November 6, 1975 order, the Appellate Division of the New York State Supreme Court reversed petitioner's conviction. In a February 17, 1977 order, the New York State Court of Appeals reinstated petitioner's conviction. In a June 16, 1977 order, the Appellate Division, on remittitur from the Court of Appeals, entered an order affirming petitioner's conviction. Diaz now seeks a writ of certiorari to review the February 17, 1977 order of the Court of Appeals.

The Proceedings in the Courts Below

On March 9, 1973, Julio Diaz and a cohort, Hector Batista, possessed twenty-six glassine envelopes containing, in total, five-sixteenths of an ounce and nine grains of heroin. In an indictment filed on April 13, 1973, Diaz was charged with criminal possession of a dangerous drug in the fourth degree (former New York Penal Law §220.15). New York County Indictment Number 1775A/73.

The Suppression Hearing and the Trial

Prior to trial, petitioner moved to suppress the heroin. At a hearing, the two arresting officers testified that they and two other policemen were on patrol on the evening of March 9, 1973. As their vehicle stopped for a light, they noticed a car with two males in the front seat (52, 79-80).* A neighborhood narcotic addict was talking to the person in the driver's seat of the car, and a local prostitute was standing on the sidewalk (25, 79-80).

* Numerals in parentheses refer to the pages of the People's appendix in the New York State Court of Appeals.

The narcotic addict removed money from his pocket, counted it out and handed it to the driver, the petitioner. The petitioner handed something back in a closed fist (26, 79, 96). The prostitute and the addict looked in the direction of the four policemen and walked hurriedly away (26, 80).

Then, for the purposes of investigation, two officers approached the car under observation (27). To insure their safety during the investigation, the officers told the petitioner to pull the car to the curb and to get out of the vehicle (81). As petitioner left the car, the officers saw petitioner attempt to conceal a bag containing glassine envelopes filled with a white powder which the officers believed to be heroin (28, 29, 33).

The petitioner presented no evidence at the suppression hearing.

During the argument of the suppression motion, defense counsel conceded that the police were justified in approaching petitioner's car for the purpose of investigation (112-113). After argument, the trial court (Rosenberg, J.) denied the motion. The court held that the police officers' testimony was credible. The court found that the police had observed contraband in plain view after they had approached the petitioner's vehicle to investigate (4a-7a). The court further held that making inquiries about narcotics justified the officers' minimal safety measure of ordering petitioner to leave the vehicle (7a-8a).

Following a jury trial, the petitioner was convicted of the charge set forth in the indictment. On June 7, 1974, he was sentenced to an indeterminate term of imprisonment not to exceed three years.

The Appeal

On the appeal to the Appellate Division of the New York State Supreme Court, petitioner asserted that the police had no justification for approaching his car and that, but for the unlawful approach, the heroin would not have been seen in plain view. In an order entered November 6, 1975, the Appellate Division suppressed the heroin found in petitioner's car and reversed his conviction. The Appellate Division held, as a matter of law, that the police had insufficient justification to approach petitioner's vehicle (16a).

In a February 17, 1977 order, the Court of Appeals reinstated the judgment of conviction. The Court of Appeals noted that defense counsel had not disagreed with the trial court's statement "that there was no disputed issue with respect to the police officers' right 'to go over to' the car to investigate the suspicious activity they had observed" (17a-18a). Therefore, under New York State law, petitioner had failed to preserve for appellate review legal questions concerning the officers' authority to approach petitioner's vehicle.

The only legal question preserved for review "was whether the police could also direct the [petitioner] to shut off the ignition and get out of the car which was then stopped at a traffic light" (18a). The hearing court had made the factual determination that the officers had told petitioner to leave the vehicle "in order to insure [the officers'] safety during the inquiry" (18a). Since the officers' order was based on a justifiable fear for their safety, the Court of Appeals held, as a matter of law, that the order to petitioner was a reasonable intrusion on petitioner's right to privacy (18a).

The case was remitted to the Appellate Division. The Appellate Division has the power to review facts. However, since it had reversed petitioner's conviction on the law, the Appellate Division had not reviewed the trial court's factual determinations. The Court of Appeals remitted the case so that the Appellate Division could have the opportunity to review the facts. *See* New York Civil Practice Law and Rules, Section 5613; Cohen and Karger, *Powers of the New York Court of Appeals,* Section 174 (1951).

In an order entered on June 16, 1977, the Appellate Division affirmed petitioner's conviction (23a).

POINT

Review on certiorari is unwarranted since the decision below did not resolve a novel question of federal law and was, in any event, correct.

In evaluating the constitutionality of the police behavior in this case, the court below relied on a familiar principle of search and seizure law. An officer who is conducting an authorized investigation may take whatever action is reasonably necessary to assure his safety. *Adams* v. *Williams,* 407 U.S. 143, 147 (1972); *Terry* v. *Ohio,* 392 U.S. 1, 19-20 (1967).

As noted by the New York Court of Appeals, defense counsel did not disagree with the hearing court's comment that there was no disputed issue regarding the officers' right "to go over to" petitioner's car to investigate (17a-18a). Since, at the hearing, the petitioner did not dispute the officers' authority to approach his car, there is a substantial question whether this Court has jurisdiction to

consider federal questions regarding that approach. Because of petitioner's failure to contest the approach at the hearing stage, the Court of Appeals was precluded from reviewing the issue. *See People* v. *Tutt,* 38 N.Y.2d 1011 (1976); New York Criminal Procedure Law, Section 470.35. In fact, the Court of Appeals did not review questions regarding the officers' approach (18a). Therefore, that portion of the Court of Appeals' decision concerning the officers' approach is based on an independent and adequate non-federal ground, the New York rule requiring the "proper presentation" of legal issues. *Street* v. *New York,* 394 U.S. 576, 581-82 (1964); *see also Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952).

In any event, the police had great justification to approach petitioner's vehicle. The police had observed an unequivocal exchange involving a known narcotic addict. The police saw the addict count out money. They saw petitioner surreptitiously hand something to the addict in exchange for the money. Upon realizing that the exchange had been observed, the addict fled. Under these circumstances, only a dull and unimaginative policeman could have failed to conclude that an illicit sale of narcotics had occurred. As this Court has held, the police would have been derelict in their duty had they not approached petitioner to investigate. *See Adams* v. *Williams,* 407 U.S. at 145-46, *supra.*

The only issue left for this Court is the correctness of the Court of Appeals' determination that the police order that petitioner shut off the ignition and get out of his car was constitutional because it was reasonably necessary to assure the officers' safety.

There is no reason for this Court to review this issue. It does not involve a novel question of federal constitutional law. Rather, the Court of Appeals was applying the familiar constitutional rule that an officer conducting an investigation may take action reasonably necessary to assure his safety. The purpose of certiorari would not be served by determining whether the Court of Appeals correctly applied a familiar rule in the context of this particular case.

In any event, the case was decided correctly. The police had great justification for investigating the observed transaction. The necessity of investigating required that they question petitioner. Under these circumstances, the officers' order that petitioner leave the car was a minimal intrusion designed to prevent an assault by a potentially hostile suspect. It is axiomatic that it is dangerous for policemen to approach vehicles in order to inquire about suspected criminal activities. *See Adams* v. *Williams,* 407 U.S. at 148, n. 3, *supra.* This danger is magnified when the officers' observations are indicative of an offense as grave as narcotics trafficking. Indeed, the officers testified that they feared for their safety when they approached petitioner's vehicle.

Despite this well-founded fear, the officers did not draw their weapons or attempt to frisk petitioner. The only action which the officers took to insure their safety was to ask petitioner to leave his vehicle, a request far less intrusive than a frisk or an approach with guns drawn. This request was necessitated by the ease with which a suspect in a car could reach for a weapon. The Fourth Amendment does not require policemen to refrain from taking measures to protect their lives when, as in this case, they have cause

to investigate activities fraught with danger to the inquiring patrolman. The officers' order to petitioner was reasonable, and there is no issue for this Court to review.

Conclusion

The petition should be denied.

Respectfully submitted,

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October, 1977